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No. 95-173

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly applied the fugitive disentitlement doctrine to bar petitioner from contesting a civil forfeiture.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 47 F.3d 1511. The opinion of the district court (Pet. App. 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petitior for rehearing was denied on May 5, 1995. Pet. App. 38a-39a. The petition for a writ of certiorari was filed on July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In October 1989, petitioner was indicted before the United States District Court for the District of Nevada on charges arising from his alleged leadership, over many years, of a major marijuana trafficking operation. On the same day, the government filed a civil forfeiture action in the same federal district court against various properties allegedly used to facilitate, or traceable to the proceeds of, the drug offenses charged in the criminal indictment. Petitioner and his wife answered the civil complaint and claimed a substantial amount of the property. Petitioner failed, however, to make an appearance to answer the criminal charges against him. Accordingly, the government moved to dismiss petitioner's claims in the forfeiture proceeding on the ground that petitioner was a fugitive from justice in the related criminal prosecution. The district court granted that motion, later granted summary judgment against petitioner's wife, and entered an order of forfeiture. The court of appeals affirmed. Pet. App. 1a-16a.

1. Petitioner was born in California in 1947, and he lived there and in Nevada and Hawaii until sometime in 1987 or 1988. See, *e.g.*, C.A. App. 75-88, 289-290, 296-297, 393-394, 401. In October 1989, a grand jury returned an indictment against petitioner before the United States District Court for the District of Nevada, charging that he had been one of three leaders of a major marijuana trafficking conspiracy, with activities beginning when petitioner was in college and extending over some 20 years. Pet. App. 2a, 27a; C.A. App. 72, 75, 391, 394. On the same day, the government filed this action in the United States District Court for the same district, seeking civil

forfeiture of a variety of real and personal property in Nevada, California, and Hawaii on the ground that it had been used to facilitate, or was traceable to the proceeds of, the drug offenses charged in the indictment.[1] Pet. App. 27a; see 21 U.S.C. 881(a)(6) and (7).

Petitioner's father was born in Switzerland (C.A. App. 401), and petitioner is therefore recognized as a Swiss citizen as well as a citizen of the United States. See Pet. App. 2a; C.A. App. 394. After authorities had arrested one of petitioner's co-conspirators and begun an investigation into petitioner's own activities (see C.A. App. 87-88), but before the grand jury returned its indictment, petitioner left the United States and resettled in Switzerland. Pet. App. 2a. The extradition treaty between Switzerland and the United States does not require either party to surrender its own nationals, and in the five years since his indictment petitioner has neither returned voluntarily to this country to face the charges against him, nor made any good faith effort to submit to the criminal jurisdiction of the district court. Pet. App. 2a-3a.

In April 1990, however, counsel representing petitioner and his wife did file answers and claims on their behalf in the civil forfeiture action. Pet. App. 27a. The government moved to strike their claims and for summary judgment, arguing that petitioner should not be heard in the civil forfeiture action while

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[1] The original forfeiture complaint included a wide array of property associated with the criminal enterprise. Petitioner and his wife filed claims to much, but not all, of that property. The properties they claimed were subsequently severed from the original proceeding and made the subject of the present separate proceeding. Pet. App. 2a.

he remained a fugitive with respect to the criminal case, and that his wife's claims were entirely derivative of his own. Pet. App. 3a, 27a; C.A. App. 380-390.

The district court granted the government's motion with respect to petitioner. Pet. App. 17a-26a. The court first determined that petitioner's refusal to return to face known charges against him was sufficient to render him a fugitive. *Id.* at 18a. It also recognized that the Ninth Circuit had previously applied the fugitive disentitlement doctrine under similar circumstances to preclude claims made by a fugitive's successor in interest in a civil forfeiture proceeding. *Id.* at 19a.

The court then considered the policies and precedents supporting application of the doctrine. Pet. App. 20a-26a. In particular, the court observed that petitioner "want[ed] [the] court to listen to his claims in the forfeiture proceeding without subjecting himself to [the] court's jurisdiction in the criminal matter," and could therefore be said to be "flout[ing] [the] court's power to prosecute him" (*id.* at 21a); that the criminal and civil proceedings in this case were closely related (*id.* at 22a-23a); and that petitioner was "responsible for his own plight," because he could avoid disentitlement at any time by returning and submitting to the jurisdiction of the court (*id.* at 23a-24a). The court noted that the government, rather than petitioner, had initiated the forfeiture proceedings, and that in this case petitioner became a fugitive before he had been convicted on the related criminal charges. *Id.* at 24a-25a. On balance, however, the court concluded that "in this case, the disentitlement doctrine bar[red] [petitioner] from defending the civil forfeiture action *in absentia*." *Id.* at 25a-26a.

The district court initially denied the government's motion for summary judgment against petitioner's wife, Karyn Degen. Pet. App. 27a-29a. The court noted that at least two parcels of real estate at issue were community property, and it identified factual issues concerning the community status of the other property at issue and the source and nature of the funds used to acquire it. *Id.* at 28a. In December 1992—after more than two years of pre-trial proceedings (see *id.* at 2a)—the government again moved for summary judgment against Karyn Degen. *Id.* at 3a. The motion was accompanied by affidavits from three of petitioner's former associates, including two major participants in his marijuana smuggling operations. *Ibid.*; C.A. App. 67-106. Those affidavits detailed many of petitioner's illegal activities, revealed the substantial amounts of money that petitioner derived from those activities over the years, and alleged that petitioner had had no significant income from legitimate sources during the long period covered by the criminal indictment. Pet. App. 3a.

Karyn Degen obtained numerous extensions of the time to respond to the government's motion, and in February 1993 obtained an order from the district court giving her access to all relevant documents and reopening discovery for an additional 60 days. Pet. App. 3a; C.A. App. 40-41. She never filed a response, however, even after the district court *sua sponte* granted two further extensions of time, accompanied by warnings that failure to respond would result in the entry of a default judgment. C.A. App. 17-18, 39. On June 23, 1993, the court granted the government's motion for summary judgment, and on August 17 it entered a final order of forfeiture. Pet. App. 30a-37a.

2. The court of appeals affirmed. Pet. App. 1a-16a. The court first noted that it and other courts have applied the disentitlement doctrine in civil cases, and particularly in forfeiture proceedings, that are related to the criminal proceedings from which the disentitled party is a fugitive. *Id.* at 4a. The court observed that it had not previously applied the doctrine in a case in which the disentitled party had fled before he had actually been convicted of a crime. *Id.* at 5a. The court found that distinction immaterial, however, agreeing with the district court that petitioner's choice not to return to face the charges against him demonstrated the sort of disrespect for that court's criminal jurisdiction that the disentitlement doctrine was intended to address. *Ibid.*

The court of appeals rejected (Pet. App. 6a-7a) petitioner's argument that the disentitlement doctrine should not apply in his case because, he alleged, in November 1992 he was arrested by Swiss authorities "at the behest of the United States government, which wished to 'transfer' its prosecution to Switzerland because extradition was impossible." *Id.* at 6a. The court observed that the only evidence of such an arrest in the district court record was an affidavit of Karyn Degen's counsel containing "virtually no factual statements based on personal knowledge." The court also noted that two letters purportedly sent to Swiss authorities by the Department of Justice's Office of International Affairs, and attached to petitioner's appellate reply brief, had not been authenticated and constituted "an inappropriate attempt to supplement the factual record on appeal." *Ibid.* The court thus found "no credible evidence properly in the record * * * to support [petitioner's] allegations of government involvement in his arrest

and prosecution in Switzerland" (*id.* at 7a). In any event, the court indicated that previous cases "suggest[ed] that the fact that a fugitive is incarcerated in a foreign jurisdiction does not preclude application of the fugitive disentitlement doctrine." *Ibid.* The court concluded by noting that "[e]ven assuming the situation would be different if [petitioner] could prove that the United States government was somehow involved in his arrest in Switzerland, we find that he has not so proven." *Ibid.*

The court of appeals found one error in the district court's opinion (Pet. App. 7a-8a): that court had erred in holding (*id.* at 26a) that it had no discretion about whether to apply the disentitlement doctrine in the particular case before it. Rather, "the doctrine is discretionary, not mandatory." *Id.* at 8a. Because petitioner did not argue that issue on appeal, however, the court of appeals deemed it to be waived. *Ibid.* The court also denied a motion, filed by petitioners shortly before oral argument, seeking to raise issues under the Double Jeopardy Clause. Pet. App. 15a-16a.

The court of appeals also affirmed the entry of summary judgment against Karyn Degen. Pet. App. 8a-16a. After reviewing the procedural history in detail (*id.* at 9a-10a), the court held (*id.* at 10a-12a) that the district court's entry of a default judgment was a proper application of a valid local rule so long as the government's motion, on its face, satisfied the standards of Rule 56 of the Federal Rules of Civil Procedure by demonstrating that there was no genuine issue of material fact and that the government was entitled to judgment as a matter of law. After reviewing the record, the court of appeals held that the affidavits submitted with the government's second summary judgment motion, if believed, estab-

lished that petitioner "earned enormous amounts of money from illegal narcotics trafficking and had virtually no legitimate income," and that that showing was sufficient to establish probable cause for the forfeiture. Pet. App. 12a. Because "the government's papers were sufficient and on their face revealed no factual issue" (*id.* at 13a) and because Karyn, despite fully adequate opportunities to develop and present opposing evidence, had failed to respond, the district court did not abuse its discretion in granting summary judgment against her. *Id.* at 13a-14a.[2]

ARGUMENT

The court of appeals correctly held that the district court could refuse to entertain petitioner's claims in this civil forfeiture proceeding so long as petitioner refused to submit to the court's jurisdiction in a related criminal proceeding. That application of the fugitive disentitlement doctrine accords with decisions in several other circuits. While those holdings conflict with the position of at least one other court of appeals, this case is not a suitable vehicle for this Court to address the issue.

1. In this Court, petitioner argues primarily that the fugitive disentitlement doctrine may not be applied at all in the context of a civil forfeiture action. This Court has consistently held, however, that a defendant's status as a fugitive "disentitles [him] to call upon the resources of the Court for the determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199, 1203-1204 (1993); *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith* v. *United States*, 94 U.S. 97 (1876); see also *United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985); *id.* at 721-723 (Stevens, J., dissenting). This "longstanding and established principle of American law" (*Dorrough*, 420 U.S. at 537) is based largely on the equitable principle that a litigant should not be entitled to invoke the protective processes of the law while simultaneously flouting its authority as a fugitive from justice. See, *e.g.*, *Ortega-Rodriguez*, 113 S. Ct. at 1206; *United States ex rel. Bailey* v. *United States Commanding Officer*, 496 F.2d 324, 326 (1st Cir. 1974).[3]

The courts of appeals have applied the *Molinaro* disentitlement doctrine to bar a wide variety of civil claims by fugitives from criminal justice. See, *e.g.*, *In*

[2] Karyn Degen is not a party to her husband's petition, and the district court's order of forfeiture has therefore become final with respect to her interest in any of the property at issue.

[3] This Court has given a number of rationales for the fugitive disentitlement rule. First, the rule is supported by enforceability concerns. As the Court explained in *Smith* v. *United States*, 94 U.S. at 97, it is "clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." Second, the rule rests "in part on a 'disentitlement' theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment." *Ortega-Rodriguez*, 113 S. Ct. at 1204. Third, the rule serves a deterrent function by "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders." *Ibid.*, quoting *Estelle* v. *Dorrough*, 420 U.S. at 537. Finally, the Court has indicated that dismissal of a fugitive's appeal "advances an interest in efficient, dignified appellate practice," and thus may be appropriate where flight "operates as an affront to the dignity of the court's proceedings." *Ortega-Rodriguez*, 113 S. Ct. at 1204-1205, 1207.

re Prevot, 59 F.3d 556, 564-565 (6th Cir. 1995) (collecting cases); *Schuster* v. *United States*, 765 F.2d 1047 (11th Cir. 1985) (review of tax assessment); *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982) (same); *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) (Freedom of Information Act proceeding), cert. denied, 455 U.S. 1002 (1982); *Broadway* v. *City of Montgomery*, 530 F.2d 657 (5th Cir. 1976) (suit for damages and injunctive relief); *Bailey*, 496 F.2d at 326 (challenge to regulation); see also *Conforte* v. *Commissioner*, 459 U.S. 1309, 1312 (1983) (Rehnquist, Circuit Justice) (courts of appeals have applied disentitlement doctrine to civil proceedings "on a number of occasions" and the Court has previously denied certiorari in that type of case); but see *Daccarett-Ghia* v. *Commissioner*, No. 95-1029 (D.C. Cir. Nov. 28, 1995) (refusing to apply doctrine to dismiss Tax Court proceeding that bore an insufficient connection to the criminal proceeding from which the taxpayer was a fugitive).

Like the court below, the Second, Tenth, and Eleventh Circuits have specifically applied the disentitlement doctrine to preclude fugitives from the criminal judicial process from seeking civil judicial protection against the forfeiture of assets that they acquired in connection with their criminal activities. *United States* v. *Timbers Preserve, Routt County*, 999 F.2d 452, 453-455 (10th Cir. 1993); *United States* v. *Eng*, 951 F.2d 461, 464-467 (2d Cir. 1991); *United States* v. *One Parcel of Real Estate at 7707 S.W. 74th Lane*, 868 F.2d 1214, 1216-1217 (11th Cir. 1989). The Third Circuit has indicated that it would apply the doctrine in an appropriate forfeiture case. *United States* v. *Contents of Accounts Numbers 3034504504 & 144-07143 at Merrill, Lynch, Pierce, Fenner &*

Smith, Inc., 971 F.2d 974, 986 n.9 (1992), cert. denied, 113 S. Ct. 1580 (1993).

In our view, those decisions are correct. As petitioner points out (Pet. 9-16), however, the circuits have reached conflicting results concerning the applicability of the disentitlement doctrine in civil forfeiture cases. Compare *United States* v. *$40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994) and *United States* v. *$83,320 in United States Currency*, 682 F.2d 573, 576 (6th Cir. 1982) with cases cited in the previous paragraph.[4] While the Sixth Circuit has not had an opportunity to reconsider its brief analysis in *$83,320* in light of later decisions in other circuits, see *In re Prevot*, 59 F.3d at 564-565 & n.10 (collecting cases, noting conflict, and apparently reserving issue), the Seventh Circuit's recent decision in *$40,877.59 in United States Currency* squarely rejects application of the disentitlement doctrine in any forfeiture case, after full analysis and after acknowledging the contrary position of other courts.[5] See also *United States* v. *Michelle's Lounge*, 39 F.3d 684, 690 (7th Cir. 1994).

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[4] See also *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636, 643-644 (1st Cir. 1988) (refusing to apply doctrine where it was unclear whether the claimant's status as a fugitive in the criminal case was related to the civil forfeiture, and because the record did not establish that the claimant had notice of the forfeiture proceeding); but see *United States* v. *Eng*, 951 F.2d at 467 (distinguishing *Pole No. 3172*); *United States* v. *$40,877.59 in United States Currency*, 32 F.3d at 1153 (same).

[5] The Seventh Circuit reasoned that forfeiture proceedings differ from other contexts in which the disentitlement doctrine has been applied, because the government, rather than the fugitive, initiates a forfeiture proceeding. See 32 F.3d at 1154-1155. The court also expressed concern, on the facts of the

2. As petitioner notes (Pet. 8-9), in our brief last Term opposing review in *Alvarez* v. *United States*, No. 94-636, we suggested that the conflict at issue here might call for review by this Court in an appropriate case. 94-636 Br. in Opp. at 16. We opposed review in *Alvarez*, however, because the claims were not properly raised, and because the procedural posture of the case was unduly complicated. *Id.* at 17. This Court denied certiorari. 115 S. Ct. 1092 (1995). This case is similarly not a suitable vehicle for this Court's review.

a. In this case, as in *Alvarez*, petitioner did not present the court of appeals with any general challenge to the applicability of the fugitive disentitlement doctrine in civil forfeiture cases until after the panel had rendered its decision. In the short sections of his opening and reply briefs that addressed the disentitlement issue, petitioner argued only that disentitlement was *no longer* appropriate in this case, because petitioner had allegedly been arrested in Switzerland and was being held and tried there at the behest of the U.S. government. Pet. C.A. Br. 30-32; Pet. C.A. Reply Br. 12-14; see also Pet. App. 6a. The section heading in each brief read only, "Brian Degen is imprisoned in the related criminal case and is no longer a fugitive for purposes of disentitlement." Pet. C.A. Br. 30; Pet. C.A. Reply Br. 12. Similarly, at oral argument, petitioner's counsel contended only that, while the district court had "properly" found Degen to be a fugitive when it entered the original disentitlement order, that finding should be revisited in

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case, with the adequacy of the government's allegations that the claimant was a fugitive and that the funds were subject to forfeiture. *Id.* at 1156-1157.

light of later developments.[6] It was not until his petition for rehearing that petitioner first urged the court of appeals to hold that the disentitlement doctrine could not be invoked in *any* civil forfeiture case. Pet. for Reh'g and Sugg. for Reh'g En Banc (filed Mar. 22, 1995) (hereafter Pet. for Reh'g).

In the district court, petitioner's initial response to the government's motion to strike his claim identified a conflict of authority over application of the disentitlement doctrine, and he argued both that the doctrine should not be applied on the facts of this case, and that it could not constitutionally be applied at all in forfeiture cases. C.A. App. 291-326. Petitioner's failure to raise the more general argument on appeal thus reflected a conscious tactical choice. Consistent with that choice, the court of appeals treated the general applicability of the doctrine in forfeiture cases as settled law, and gave fresh consideration only to the question whether the doctrine could properly be applied to a claimant who had fled the jurisdiction before he was actually convicted of a crime. Pet. App. 4a-5a. While this Court undoubtedly has the discretion to review petitioner's current claim in view of the court of appeals' application of the disentitlement doctrine in his case, see *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992), petitioner's abandonment of that issue before the appellate panel, including his failure to call the panel's attention to

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[6] The oral argument was recorded by the court of appeals, but it has not been officially transcribed. We obtained a copy of the tape recording from the court of appeals, and we have lodged a copy with the Clerk of this Court. For the Court's convenience, we have also lodged with the Clerk copies of the parties' briefs on appeal.

the Seventh Circuit's recent decision in *$40,877.59*, counsels against the exercise of that discretion here.[7]

There is no reason for a different result simply because petitioner raised the issue in his petition for rehearing and suggestion of rehearing en banc. At that late point in the proceedings, it is unlikely that either the panel or the full court would have considered the issue on the merits. Indeed, the panel had already applied waiver principles in declining to consider another claim that it considered meritorious, but that petitioner had not argued on appeal. Pet. App. 8a. Against that background, there is no reason for this Court to accord petitioner review of a claim that he chose not to present to the court of appeals, and which for that reason was not adequately briefed, argued, or considered below. Cf. *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39-40 (1989); *Williams*, 504 U.S. at 44-45 (noting special circumstances).[8]

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[7] Petitioner's reply brief in the court of appeals was filed in July 1994, approximately one month before the Seventh Circuit announced its decision in *$40,877.59*. Oral argument did not take place, however, until December 1994. Before argument, petitioner filed both a motion to supplement the factual record with respect to the disentitlement issue and a "motion to remand" that sought to raise a new double jeopardy argument in reliance on a Ninth Circuit decision rendered in September 1994. Pet. App. 6a n.1, 15a. The court of appeals denied the motion to supplement the record, but it addressed the double jeopardy argument on the merits. *Ibid.* Petitioner could have availed himself of the same method of raising an argument based on the decision in *$40,877.59* (cf. Fed. R. App. P. 28(j)), but he did not.

[8] In *Williams*, the government urged this Court to review the question whether prosecutors must disclose exculpatory evidence to a grand jury, even though the government had

b. Review is also inadvisable in this case because of the existence of a potentially significant issue on which the record is factually and legally incomplete. As we have noted, in the court below petitioner argued that he was no longer a fugitive because, he alleged, he had been arrested and was being tried in Switzerland, at the behest of the United States and on the same charges that he would have faced at trial before the district court. The court of appeals rejected that argument, finding that "[a]ll in all, * * * there [was] no credible evidence properly in the record * * * to support [petitioner's] allegations." Pet. App. 7a.[9] The court further noted that foreign

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argued on appeal only that it had met its duty under circuit precedent to disclose such evidence. 504 U.S. at 44-45. In that case, however, the government had not raised the issue in the district court and then abandoned it on appeal, as petitioner did here. Moreover, the government had previously raised in the court of appeals its claim that there was no duty to disclose exculpatory evidence to the grand jury, and had lost on that issue. See *United States* v. *Page*, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987). In explaining its grant of certiorari, this Court noted that "[i]t is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." *Williams*, 504 U.S. at 44-45 (footnote omitted).

[9] Petitioner's motion to supplement the record in the court of appeals and his reply brief to the panel included copies of two letters from the Department of Justice's Office of International Affairs to Swiss authorities requesting that the Swiss prosecute petitioner. Pet. App. 6a. The court of appeals discounted those letters because they were not authenticated, constituted hearsay, and were not submitted to the district

incarceration probably would not preclude application of the disentitlement doctrine, and that "[e]ven assuming the situation would be different if [petitioner] could prove that the United States government was somehow involved in his arrest in Switzerland, * * * he has not so proven." *Ibid.*

The court of appeals correctly held that because petitioner failed to raise the issue of his continuing fugitive status before the district court, or to make a proper factual record on the issue, he was not entitled to relief, whatever the merits of a properly presented claim. Although petitioner's counsel had attended proceedings conducted by a Swiss magistrate in Reno, Nevada (see transcript of hearing held 9/13/93, attached to Pet. C.A. Mot. to Supplement Rec. (filed Dec. 9, 1994)), and had argued before the district court about the effect of petitioner's arrest and prosecution in Switzerland on discovery issues relating to *Karyn* Degen's claims (see 2/1/93 Tr. 7-9, 39-44), petitioner never asked the district court to reconsider its disentitlement order on the basis of the developments in Switzerland. He further failed to develop any factual record, such as a copy of the Swiss charges filed against him, to support the claim he eventually made to the court of appeals that the "Swiss arrested [him] at the behest of the United States government, which wished to 'transfer' its prosecution to Switzerland because extradition was impossible." Pet. App. 6a. The court of appeals was not required to address that claim in a factual vacuum.

We note that the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request

court. *Ibid.* The letters are, in fact, authentic. See also note 11, *infra*.

of the United States and based principally on the conduct that formed the basis for the U.S. indictment.[10] The factual and legal issues raised by that development have not been thoroughly explored in the lower courts, and the responsibility for that omission rests primarily with petitioner.[11] Nonetheless, in

[10] Petitioner was indicted in October 1989. Pet. App. 17a. The United States first requested that Swiss authorities prosecute him in February 1990. See Pet. C.A. Rep. Br. Appendix. The district court's disentitlement order was entered on January 4, 1991. Pet. App. 17a. Petitioner was first arrested by Swiss authorities in November, 1992. *Id.* at 6a. The district court did not enter its final order of forfeiture until June 1993. *Id.* at 30a. We are informed that the Swiss proceedings have now progressed to the point where a trial might take place in early 1996.

[11] Some statements in the government's brief (at 15-18) incorrectly suggested that the Department of Justice played no part at all in instigating the Swiss prosecution, when in fact the Department did request that Swiss authorities prosecute petitioner in Switzerland for the same conduct that underlay his indictment in the United States. For example, the government's brief characterized petitioner's arguments as "an imaginative attempt to blame the United States for [petitioner's] incarceration in Switzerland" (Gov't C.A. Br. 15 n.9), and stated that, "While living in Switzerland, Brian Degen has apparently run afoul of Swiss law. He is incarcerated and is being prosecuted in Switzerland. He was arrested, in November, 1992, in Switzerland by Swiss authorities in connection with a purely Swiss prosecution." Gov't C.A. Br. 16; see also *id.* at 17-18.

The government's brief did not, in our judgment, appropriately acknowledge and set forth the full factual background of the government's involvement in urging Swiss authorities to prosecute petitioner. The information before the court of appeals included, however, that which was provided at oral argument. We have reviewed a recording of the argument (see note 6, *supra*), in which the government's attorney

this Court petitioner suggests for other reasons (see Pet. 23-24) that he may not properly be considered a "fugitive" for disentitlement purposes, and that issue may be "fairly included" in the question presented by the petition (see Sup. Ct. R. 14.1(a)). It is also a threshold matter that could have a bearing on the proper application of the fugitive disentitlement doctrine in this or any similar case. It would be inadvisable for this Court to undertake plenary review of the applicability and scope of the fugitive disentitlement doctrine in the civil forfeiture context in a case in which petitioner's conduct of the litigation below has left the record factually and legally inadequate with respect to such a potentially significant issue. If further exploration of petitioner's fugitive status were warranted, that inquiry would be better conducted in the lower courts in the first instance.

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acknowledged that the United States had "encouraged" the Swiss prosecution and had sent Swiss authorities a copy of the U.S. indictment. In our view, the oral argument apprised the panel that the United States had asked the Swiss government to prosecute Degen, and that, in the government's view, the Swiss prosecution constituted an action within the discretion of a foreign sovereign, rather than (as petitioner alleged) a prosecution effectively conducted by the United States itself "under Swiss procedure" (Pet. C.A. Br. 32). The panel nevertheless properly resolved the Swiss prosecution issue against petitioner on the basis of his failure to develop an adequate record for examination of the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1995